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NO. 00-1712

In The
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER VENEKLASE, PAUL B. MEHL, DAROLD LARSON, NANCY EMMEL AND JESSICA UCHTMAN,
Petitioners,

v.

CITY OF FARGO,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. Reply to Counter-Statement of the Case

The only remarkable aspect of Respondent's Counter-Statement of the Case is the liberty taken with the record to suggest that Petitioners' conduct had focused on Jane Bovard's residence — as in the following passage:

> The protestors walked continuously back and forth, in single file, on the sidewalk in front of the Bovard home, including in their route the two to three houses on either side of the targeted residence. At least one demonstrator was in front of the Bovard home at all times.

Respondent's Brief at 1. *See also id.* at 16.

Not only is it undisputed that no one ever walked "back and forth . . . in front of the Bovard home" — even Respondent indirectly acknowledges the 6 to 8 house route — but the misleading allegation that "[a]t least one demonstrator was in front of the Bovard home at all times" was not heard until well after this litigation began: *i.e.*, when Respondent began to get educated about *Frisby*. It is apparent that that allegation — which appears nowhere in the police reports [App. P] — was spawned by Respondent's desire to create an image of "targeted" picketing after Respondent realized that Petitioners' conduct was protected by *Frisby*. This Court must not be misled.

With 15 to 20 people walking in single file in front of 6 to 8 houses, it is likely that at least one person was always in front of *every* home along the route. Indeed, such a conclusion is required by the *unrebutted* fact that Petitioners gave no emphasis to Bovard's home or to any other home. *See* Affidavit of Christopher Martin Veneklase, App. L, ¶¶ 4, 10. Arresting Officer Jon Holman finally conceded this

reality when pressed under oath:

> MR. CONDIT: But their personal conduct was not emphasizing Bovard's residence, and it wasn't emphasizing any of the other residences . . . .
>
> HOLMAN: Jane Bovard's house was in the middle.
>
> MR. CONDIT: Their conduct was not giving any special emphasis to her or any other house.
>
> HOLMAN: I don't recall any.

Holman Deposition, 8th Cir. Jt. App. at 149-50.

If Respondent wants to defend its enforcement practices on *Frisby* grounds, it should do so with candor and refrain from mischaracterizing uncontested facts to create the fiction of "targeted" picketing — which never occurred in this case.

II. Respondent's Brief in Opposition Reinforces the Reasons for Granting the Writ.

A. Importance of Constitutional Question

In his concurrence in *Frisby v. Schultz*, 487 U.S. 474 (1988), Justice White expressed significant doubt about the residential picketing ordinance as written, but was comfortable enough with this Court's narrowing (single residence) construction to "await further developments." *Id.* at 491. Thirteen years later, the disturbing "developments" in the Eighth Circuit permit a city to criminalize precisely what was protected under *Frisby*. Respondent's Brief in Opposition ("Brief") presents nothing to reconcile the Eighth Circuit's anti-picketing, anti-prayer decision with *Frisby*.

This Court reviewed *Frisby* "[b]ecause the question presented [was] of *substantial importance* . . . ." *Frisby*, 487 U.S. at 479 (emphasis added). The justification for review is at least as compelling in this case, where the freedom to

picket, pray or even walk silently on residential sidewalks — a traditional public forum — has been nullified and left to the discretion of any police officer who claims to perceive a "target" along the route. Should this Court permit the Eighth Circuit decision to stand, no lawyer in the country will be able to advise a client with any degree of certainty about how to picket (or pray) lawfully in a residential neighborhood.

B. Circuit Conflict

Respondent argues that there is no conflict between the decision below and cases from the other circuits. Brief at 25-28. There can be no doubt, however, that the factual scenarios presented and the *Frisby* arguments posed in this case and in *Vittitow v. City of Upper Arlington*, 43 F.3d 1100 (6th Cir. 1995), are similar enough to render the two interpretations of *Frisby* irreconcilable. The obviousness of the conflict may be muddied by the way Respondent mischaracterized *Vittitow*, necessitating this clarification.

In *Vittitow* the district court enjoined an unconstitutional application of a *Frisby-style* ordinance. The Plaintiffs appealed the district court's creation of a bubble zone as part of its injunction against the city,[1] which cross-appealed and argued that its *Frisby*-style ordinance could be enforced as a ban beyond the sidewalk in front of a single residence. The Sixth Circuit rejected that argument and enforced this Court's literal holding in *Frisby*. *See Vittitow*, 43 F.3d at 1107. Notwithstanding any ordinance/injunction distinction, the Sixth and Eighth Circuits have now addressed precisely the

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[1] Respondent is wrong when it states that "the injunction in *Vittitow* was a complete ban on residential picketing." Brief at 26, n.8. More accurately, Upper Arlington had tried to enforce its ordinance as a total ban (just like Fargo), thereby requiring injunctive relief.

same legal question on similar facts and reached diametrically opposite conclusions about *Frisby*.

III. Petitioners' Reply to Respondent's Legal Analysis

A. Facial Overbreadth

Respondent now suggests, for the first time, that the facial overbreadth of the Fargo ordinance is a moot issue, based upon principles of third party standing.[2] Brief at 3-7. Respondent further asserts that "[t]he First Amendment overbreadth doctrine is limited to claims for prospective relief," Brief at 4, without citing a single case to support that limitation. Indeed, some of the very cases cited by Respondent permitted criminal defendants to attack the *past* enforcement of an overbroad ordinance. Petitioners merely do the same here in a civil action, seeking damages for actual injury suffered when they were arrested under a facially invalid ordinance. Respondent is really arguing that one may never recover civil damages solely for being arrested under a facially overbroad ordinance, and that liability for damages is necessarily limited to how an ordinance was *applied* to an arrestee. None of the case law cited by Respondent stands for that proposition either.

Respondent alternatively argues that the Fargo ordinance is facially valid because a virtually identical ordinance was upheld in *Frisby*. Brief at 8-11. Respondent's argument boldly disregards the constitutionally-necessary narrowing construction set out in *Frisby*. The arrest of Petitioners for walking a non-intrusive route in front of six to eighth houses was merely one application of Fargo's general residential picketing ban. Ignorant of *Frisby*, Respondent failed to narrow its facially overbroad ordinance, both in theory and in

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[2] On this point, Petitioners are compelled to alert this Court that the repeal of Fargo's ordinance, Brief at App. A, was never entered into the record in this case and should be stricken.

practice. Enforcement of a law facially violative of the First Amendment "is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Judge Arnold's dissent properly analyzes why Respondent is therefore liable for enforcing it.

Chief Raftevold's testimony, cited by Judge Arnold, is an "authoritative construction[] of the ordinance," *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 132 (1992). "In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (citation omitted). Respondent's reliance on Justice Scalia's concurrence in *Crandon v. United States*, 494 U.S. 152 (1990), Brief at 12-13, is misplaced. First, *Crandon* is not a First Amendment overbreadth case. Second, Justice Scalia's statement that the courts do not defer to a prosecutor's interpretation of a statute, *id.* at 177, in no way purports to overrule settled case law about the capacity of a "final policymak[er]" to speak for a municipality. *Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1989). Any doubt about the capacity of a final decision maker to provide an authoritative construction of a local ordinance is just one more reason for this Court to grant the writ.

B. As-Applied Unconstitutionality

Perhaps nothing compels this Court's review more than Respondent's discussion of the "as applied" constitutional violations in this case.[3] Respondent characterizes the silent

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[3] Respondent erroneously states that "Petitioners' as-applied claim is foreclosed" due to an alleged failure to appeal the District

prayer walk as "no less focused upon a single residence [than the picketing in *Frisby*], notwithstanding that Petitioners extended their route to the two or three houses on either side of Ms. Bovard's home." Brief at 21. By adopting such reasoning, the Eighth Circuit majority has scrambled the *Frisby* holding beyond recognition. The evil identified in *Frisby* is "to intrude upon the targeted resident, and to do so in an especially offensive way." *Frisby*, 487 U.S. at 486. Bovard's mere presence along the route does not automatically convert the prayer walk into proscribable "focused" picketing. "*Frisby* does not say that picketers lose the shelter of the First Amendment whenever their activity is 'directed at a specific occupant of a building[.]'" *Veneklase v. City of Fargo*, 248 F.3d at 750 (Arnold, J., dissenting). App. A21. "It is true that [Bovard] lived in one of the houses along the protesters' path, but such a fact alone cannot be used to prohibit the Defendants' activity." *Veneklase v. City of Fargo*, 904 F.Supp. 1038, 1050 n.11 (D.N.D. 1995) (quoting and adopting statement of county court). *Accord Vittitow v. City of Upper Arlington*, 43 F.3d at 1106-1107

Court's decision on that point. Brief at 17. After *Veneklase v. City of Fargo*, 78 F.3d 1264 (8th Cir. 1996) (*Veneklase I*), there was no final appealable order until Petitioners obtained damages from a jury in August 1997. Respondent appealed that judgment, and Petitioners in their Eighth Circuit appellate brief asserted several alternative grounds for affirmance, including a prominent discussion of the as-applied *Frisby* violations now before this Court. *See* 8th Cir. Internal Operating Procedure F(1). "[T]he issue of the liability of the City of Fargo for the unconstitutional enforcement of the ordinance . . . exists in plaintiffs' initial briefs as an alternate ground for affirmance by the court." *Veneklase v. City of Fargo*, 248 F.3d 738, 742 (8th Cir. 2001). App. A5-6. This as-applied *Frisby* issue is therefore fully preserved for this court's review, as both the en banc majority and Judge Arnold's dissent acknowledge. *Id.* at 752. App. A23.

(mere fact that police "can discern one residence as being the target of picketing" does not, without more, engage the ordinance).

The perceptions about how *Frisby* governs this case differ in the extreme. Petitioners agree with the District Court that walking in silent prayer on the public sidewalk in front of an entire block of houses is "as accommodating to residential privacy interests as any picket could be." *Veneklase v. City of Fargo*, 904 F.Supp. at 1050. Respondent, however, equates a silent prayer walk with the "devastating effect," Brief at 15, of the far more intrusive "targeted picketing" described in *Frisby*. *Id.* at 486-87. Respondent also views the prayer walk as "a directed protest" at "an unwilling listener captive in her home." Brief at 16. The en banc majority agrees that the silent prayer walk constituted "focused residential picketing," App. A15. Judge Arnold and the four other dissenting judges, on the other hand, are bewildered about "what kind of constitutional difficulties the *Frisby* court could have had in mind," App. A25, if Petitioners' non-intrusive route can still be criminalized.

Respondent mischaracterizes *Douglas v. Brownell*, 88 F.3d 1511 (8th Cir. 1996) as "upholding [a] residential picketing ordinance that proscribed targeted picketing of residence when protestors extended course to three houses on each side of target as narrowly tailored." Brief at 21. The *Brownell* ordinance in fact limited picketing only "in front of or within one house on either side of a residence or dwelling." *Id.* at 1514 n.5. The Eighth Circuit described this as a "three-house zone." *Id.* at 1520. Moreover, the *Brownell* ordinance otherwise accommodated residential picketing — contrary to how Fargo applied *its* ordinance to arrest anyone who would not leave the neighborhood. Furthermore, whether a differently-written ordinance might be constitutional beyond a one-house zone is not relevant to *this*

case. *See Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 135 (6th Cir. 1994) (where ordinance under consideration is "virtually identical" to one construed by Supreme Court, district court is "bound to adhere to specific result of that case"). Thus, *Brownell* does not help Respondent.

That the parties in this case, and the many lower court judges who have reviewed it, could have such differing views about how *Frisby* governs an expansive silent prayer walk compels this Court's review.

IV. Municipal Liability

The error of the Eighth Circuit majority in equating qualified immunity with municipal immunity, Petition at 18-20, is passed over in silence, and therefore conceded, by Respondent, which instead stresses "failure-to-train" and "deliberate indifference" mechanisms that are unnecessary when the ordinance itself — the City's codified policy — is the moving force behind the arrests. *See Board of Bryan County Comm'rs v. Brown*, 520 U.S. 397, 404-05 (1997); *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978).

Tracking the Eighth Circuit majority, Respondent argues the municipal liability issue as if it turns exclusively on a "failure to train" theory, and then concludes that the qualified immunity opinion in *Veneklase I* forecloses that issue, a theory this Court has never adopted. Still, the facts unquestionably *do* support "failure to train" liability due to the pervasive indifference of Fargo policymakers both before and after the arrests. After acting on a perceived need by passing Fargo's anti-picketing ordinance in 1985, the policymakers failed to train Fargo's police about enforcement issues: (1) after the ordinance was passed but before *Frisby*;

(2) after *Frisby*; (3) after the *Copper*[4] and *Veneklase* plaintiffs were arrested eight weeks apart in 1991; and (4) after criminal charges against both groups were dismissed on *Frisby* grounds by a state court judge in 1992. Six months after this *Frisby*-centered litigation commenced, policymaker Raftevold testified that he had no intention of training his officers about *Frisby* issues, and then ratified the arrests of Petitioners while reaffirming his belief that a picket route passing in front of 100 houses could be banned under the ordinance. That the dubious qualified immunity analysis in *Veneklase I* has been employed to vindicate Fargo's recalcitrant city government as well is just one more disturbing aspect of the Eighth Circuit's jurisprudence.

Deliberate indifference aside, Judge Arnold's citation to cases which upheld the assessment of damages against municipalities for arrests made pursuant to an unconstitutional ordinance is directly on point. App. A26. Fargo is liable for these arrests, regardless of the qualified immunity of its officers.[5] "Where, as here, a local police officer enforces an unconstitutional ordinance, relief lies against the city." *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994), citing *Monell* at 694.

The overriding principle, regardless of whether the

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[4] Contrary to Respondent's statement, Brief at 20, Petitioners were not the first persons arrested under the ordinance. *See Copper v. City of Fargo*, 184 F.3d 994 (8th Cir. 1999) (picketers arrested on August 20, 1991).

[5] Because the denial of certiorari in *Veneklase I*, 519 U.S. 867 (1996), has no precedential value, *Teague v. Lane*, 489 U.S. 288, 296 (1989), the Eighth Circuit's determination that the scope of the right recognized in *Frisby* was not "clearly established" in 1991 is fully reviewable for purposes of the municipal liability determination.

constitutional violation is premised on facial or as-applied overbreadth and regardless of the "failure to train theory," is that Fargo's official policy — the ordinance itself — was the sole moving force behind the arrests. Lacking any training, Lt. Holman relied solely on the text of the overbroad ordinance as written when deciding to make the arrests. Fargo policy as written, intended, and later interpreted and ratified, was therefore the sole moving force behind the violations. With or without Respondent's conclusive Rule 36 admissions, App. M, *Monell* liability is established on these facts.

V. Conclusion

Redefinition of *Frisby* is solely the prerogative of this Court, not of a subsidiary tribunal. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Petitioners were unconstitutionally arrested for walking a route clearly protected by *Frisby*; the City of Fargo is liable for these arrests by reason of its enforcement of an ordinance which is facially unconstitutional without *Frisby's* limiting construction, and was the sole moving force behind the arrests. To maintain this Court's control over its own precedents and to preserve the First Amendment rights protected by *Frisby*, the writ of certiorari should be granted.

Respectfully submitted,

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